

# PCS PRIMECO, L.P.

January 20, 1995

## BY HAND

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Broadband PCS Auctions, PP Docket No. 93-253 --  
January 10, 1995 Erratum

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

PCS PRIMECO, L.P. ("PRIMECO") submits this letter to express its serious concerns regarding a particular rule change announced in the recent Erratum released by the Wireless Telecommunications Bureau ("Bureau") in the above-captioned docket.<sup>1</sup> By Erratum, the Bureau has revised the so-called unjust enrichment provisions contained in 47 C.F.R. § 24.712 (d)(1)-(d)(2), as adopted in the Commission's Fifth Memorandum Opinion and Order in PP Docket No. 93-253 ("Fifth MO&O").<sup>2</sup>

PRIMECO submits that the Erratum rule change is improper, unnecessary, and will inhibit designated entity ("DE") participation in the broadband PCS licensing process -- a result clearly contrary to Congress' stated objectives in the Omnibus Budget Reconciliation Act

<sup>1</sup> Erratum, DA 95-19 (released Jan. 10, 1995).

<sup>2</sup> Sections 24.712(d)(1)-(d)(2), as adopted in the Fifth MO&O, (released November 23, 1994) required designated entity licensees to reimburse the government for the amount of any bidding credit received as a condition to approval of an assignment/transfer of their licenses to non-eligible entities "before termination of the five-year period following the date of the initial license grant." 47 C.F.R. § 24.712(d)1-(d)(2) (emphasis added). The rules, as revised in the Erratum (released January 10, 1995), now require "recapture" of the bidding credit received if the assignment/transfer takes place at any time during the entire ten-year license period. We note at the outset that this change is inconsistent with the treatment of bidding credits in other services subject to competitive bidding. See 47 C.F.R. § 24.309(f) (limiting the narrowband unjust enrichment provision to a five-year period).

of 1993. For the reasons discussed below, we respectfully urge the Commission to promptly revisit the Bureau's improper action, withdraw the Erratum, and reinstate the unjust enrichment provisions originally adopted in the Fifth MO&O.<sup>3</sup>

The prior unjust enrichment rule contained in the Fifth MO&O, which was adopted by the Commission and duly published in the Federal Register, expressly limited the recapture penalty to a five-year period.<sup>4</sup> DEs and investors, including PRIMECO, have properly taken actions over the last two months (and at a critical time) in reliance on this rule as promulgated. Changing the ground rules without explanation at this late date by Bureau Erratum -- after months of intense discussions with various potential DE partners and shortly before the February 28 application filing deadline -- has already caused severe and negative disruptions to DE investment negotiations.

The avowed premise of the revised "recapture" provision is that DEs, having received as much as a 25% bidding credit, should not be able to benefit from this credit unless they are involved in the business for the ten-year license term. This policy may have merit in the abstract but it is inconsistent with business reality. Furthermore, there is strong evidence to suggest that the recapture policy is based on an erroneous premise -- that DE licenses will be purchased at a discount price below fair market value. In fact, the experience in the recently concluded regional narrowband PCS auction suggests that DE applicants will pay full market value for licenses (after netting out the applicable credit). Under such circumstances, imposition of a ten-year unjust enrichment provision is clearly not justified.

While the DE-related narrowband PCS rules are somewhat different than the broadband PCS rules, there are important similarities. In particular, in the narrowband auction entities meeting the eligibility standards for DE status were given a 40% bidding credit for licenses acquired on frequency blocks 2 and 6. However, narrowband DE applicants, as a general rule, still paid full market value for their licenses. This is because the narrowband DE

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<sup>3</sup> The Fifth MO&O rules were published in the Federal Register on December 7, 1994, 59 Fed. Reg. 63210 (December 7, 1994). Because the January 10, 1995 Bureau Erratum contains substantive revisions to final Commission rules, reconsideration is appropriate. See Amendment of the Commission's Rules for Rural Cellular Radio Service, CC Docket No. 85-388, Order, 2 FCC Rcd. 4451 (1987) (allowing petitions for reconsideration to be filed 30 days from date of publication of Erratum released after deadline for filing petitions for reconsideration of the adopted rules had passed).

<sup>4</sup> The Fifth MO&O rule revision to the unjust enrichment period was clearly made, and the only discussion in the text also referred to imposition of a five year requirement. Fifth MO&O at ¶ 127. (PRIMECO notes that the only other discussion of the unjust enrichment provision was in the "background" section and discussed the prior rule, as adopted in the earlier Fifth Report & Order in this proceeding. 59 Fed. Reg. 37,566 (July 22, 1994) ("Fifth R&O"). See Fifth MO&O at ¶ 119, n. 276.)

"bidding credit" turned out not to be a "credit" at all but rather a "premium" on the "gross" value of the license. DEs were willing and able to bid license amounts that equalled (or exceeded) market value with the knowledge that the bidding credit, when factored in, simply brought the net bid amount down to market levels.<sup>5</sup> The bidding credit did achieve the Commission's intended result -- DEs were able to bid effectively against non-DE entities; accordingly, DEs were provided with a realistic opportunity to participate in the narrowband auctions and acquire PCS licenses.

Based on the narrowband experience, winning DEs in the broadband auction will thus not likely be the recipients of a "bidding credit" discount. Consequently, the subsequent sale of DE licenses at market value within the license period will not result in unjust enrichment. Under these circumstances, the ten-year repayment requirement amounts to a penalty on DE participants and it is the government, already having received full value for the licenses, which will likely enjoy an unanticipated -- and unintended -- windfall.

In addition, the Commission has recognized that there are any number of legitimate business reasons why a DE may want or need to assign/transfer its interests in a broadband PCS license prior to the end of the ten-year license term. Based on this fact, the Commission appropriately chose to limit the mandatory holding period to five years (three years for transfers to other DEs) to balance the need to ensure that DEs retain de facto and de jure control with the need to provide the flexibility required for DEs to attract the capital necessary to create significant DE participation in PCS.<sup>6</sup> The Erratum makes that choice entirely illusory.

In fact, a DE's ability to exit the PCS business for legitimate reasons will be substantially undermined if the ten-year unjust enrichment provision is retained. Would-be purchasers will be inhibited by the realization that the value of their potential interest will be diminished by the amount of the repayment requirement imposed on the buyer as a condition of purchase. In those markets where the bidding credit results in the payment of a license premium (as discussed above), DEs will not be able to realize the market value for the licenses because a recapture penalty will have to be paid in the event of a transfer or assignment. These obstacles to the assignment/transfer of DE licenses to non-DE entities may, as a practical matter, unduly and unnecessarily "lock-in" DEs for the full ten-year license period without justification. The

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<sup>5</sup> In fact, the DEs actually paid a greater net amount (after subtracting the 40% bidding credit) than non-DEs in seven of the ten markets in which DEs and non-DEs bid on comparable licenses. For example, the DE paid \$11,262,003 (after subtracting the 40% bidding credit) for the license associated with Region 02, Frequency Block 06, while the comparable non-DE license (Region 02, Frequency Block 05) was acquired for \$8,000,013. Similarly, the DE paid \$10,488,000 (after subtracting the offset) for the Region 04, Frequency Block 06 license, while the non-DE paid \$8,262,000 for the comparable license (Region 04, Frequency Block 05).

<sup>6</sup> Fifth R&O at ¶ 129.

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ten-year unjust enrichment provision thus undermines the five-year holding period policy and prevents legitimate and sound business transactions by DE licensees.<sup>7</sup>

Moreover, the investment community is adversely effected by the new rule, which will undermine certainty regarding DE license valuation. Under the old rule, where the holding period and the unjust enrichment transfer period coincided (i.e., five years), investors could assess with some precision the value of a particular license and include this set figure in calculations regarding cash flow, needed loan amounts and other business-related judgments. Now that the holding period and unjust enrichment transfer period have been staggered, this needed certainty in the investment process has been eliminated. If a DE chooses to exit the business before the end of the license term,<sup>8</sup> its transfer of the license will put non-DE investors in an untenable financial position. Investor groups will be hard-pressed to justify DE license investments under such circumstances.

We can confirm, based on our own ongoing DE negotiations, that this rule change has adversely impacted the financial community's willingness to invest in DE applicants. Customary equity and debt financing arrangements are based on commitments that allow for some liquidity in the medium term. Liquidity of investment is essential to commercial lenders and venture capitalists, particularly in an industry with high upfront expenses and no near-term cash flow. For this reason, we have been advised by potential DE applicants that they are encountering real difficulties in obtaining the necessary financing as a result of the ten-year rule.

In conclusion, the problems associated with the ten-year unjust enrichment period will directly and negatively impact the Commission's stated objectives. The reinstatement of the five-year unjust enrichment rule will benefit DEs and assist these entities in attracting necessary capital. PRIMECO acknowledges the Commission's concern that DEs be bona fide entities with a legitimate interest in participating in the telecommunications marketplace for the long term. We believe, however, that there are sufficient rules in place, without the ten-year unjust enrichment provision, to ensure that these objectives are achieved. Accordingly, we urge the

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<sup>7</sup> The Commission has recognized that license transfer prohibitions, even for a limited time, "may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously." Second Report and Order, 9 FCC Rcd. 2348, 2395 (1994). Indeed, in the Second R&O, the Commission limited the "recapture"/unjust enrichment provisions to a five-year period, consistent with the action taken in the later Fifth MO&O. 47 C.F.R. § 1-2111(b). See Second R&O, 9 FCC Rcd. at 2394. ("In no event will the recapture provisions apply to the transfer or assignment of a license that has been held more than five years.")

<sup>8</sup> While we expect many DEs to remain in the PCS business well beyond the five-year holding period, a DE's decision to exit the business after five years, but before the end of the license period, will clearly be its own.

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Commission to withdraw the Bureau's Erratum and reinstate the five-year unjust enrichment provision contained in its Fifth MO&O.

Sincerely yours,

PCS PRIMECO, L.P.

A handwritten signature in cursive script, appearing to read "George Schmitt".

George Schmitt  
President and Chief Executive Officer

cc: Chairman Reed E. Hundt  
Commissioner James H. Quello  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness